APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-1477

THE DAVIS, COMPANY,
Plaintiff-Appellee,

vs.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; and WILLIE RUDD,
Defendants-Appellants.

Filed Mar. 31, 1982

Before: EDWARDS, Chief Judge; WEICK and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed with directions to dismiss the action.

It is further ordered that Defendants-Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below,

and that execution therefore issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk
JOHN P. HEHMAN
A True Copy
Attest:
/s/ Audrey Crochett
AUDREY CROCHETT
Deputy Clerk

Issued as Mandate: May 24, 1982

COSTS: To Be Recovered By Appellant

Filing fee	$
Printing	$281.12
Total	$281.12

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action File No. 78-2396

THE DAVIS, COMPANY,

VS.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO:
LOCAL NO. 282, UNITED FURNITURE WORKERS
OF AMERICA, AFL-CIO AND WILLIE RUDD

JUDGMENT

This action came on for trial before the Court, Honorable Robert M. McRae, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered against the defendants United Furniture Workers of America, AFL-CIO, Local No. 282, and Willie Rudd and in favor of the plaintiff, The Davis Company, in the amount of $7,416.95 plus costs.

Filed: June 3, 1980

APPROVED:

/s/ Robert M. McRae, Jr., Judge,
ROBERT M. MCRAE, JR.,
United States District Court

Dated at Memphis this 3rd day of June, 1982

/s/ J. Franklin Reid
J. FRANKLIN REID
Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 78-2396-M

THE DAVIS, COMPANY,

Plaintiff,

v

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL NO. 282; UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; and WILLIE RUDD,

Defendants.

Filed: May 30 12:40 PM '80

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard by the Court without a jury. The following findings of fact and conclusions of law constitute the ruling of the Court in this cause.

FINDINGS OF FACT

1. Defendant Local is the duly certified collective bargaining agent for the production employees at plaintiff, The Davis Company.

2. On September 6, 1977, plaintiff and defendant Local entered into a collective bargaining agreement governing the wages, hours, and other terms and conditions of employment at The Davis Company. (See Trial Exhibit No. 1). Said collective bargaining agreement was in full force and effect during the events involved in this suit.

3. Article VI of the collective bargaining agreement is entitled "Hours of Work and Overtime Pay," and it provides as follows:

> An employee will be paid 1-1/2 times over eight (8) hours any day worked, provided (a) they are scheduled to work five (5) or more days in the work week *and* (b) that employee works all scheduled hours during their work week. There shall be no pyramiding of overtime.

Article X, Section 4 provides:

> The Employer shall provide the Union with a bulletin board in the plant which the Union and its members shall have the right to use for the purpose of giving notice of Union activities, such as meetings, special events and other similar matters. The Union agrees that it will not publish or circulate any false or misleading remarks about the Employer, its products, its officers, and other personnel.

5. Article III provides for a four-step grievance procedure to handle grievances between the company and its employees. There is no provision for binding arbitration.

6. Article III, Section 1(d) provides as a fourth step of the grievance proceedings that there will be a meeting between representatives of the Union and Employer, who will conduct a full hearing from all persons who know the facts. The last sentence in Section 1(d) provides as follows:

> If no such settlement is arrived at within five (5) days after the meeting, then the Union may strike, and the Employer may lock out the employees.

However, the parties never got to the end of the five-day period after a meeting such as the one called for in the fourth step of the grievance procedure.

7. On or about June 27, 1979, certain employees, acting through the union, filed a grievance with the company alleging that the company had not been paying overtime in compliance with Article VI of the collective bargaining agreement. At "step two" of the grievance proceeding, the company discovered that it had erred in paying employees overtime based

on hours worked in excess of 40 hours a week, as opposed to overtime computed on a daily basis as required by the collective bargaining agreement. The company took immediate action to reimburse all affected employees, and it issued checks in the middle of July to all employees entitled to back pay.

8. The union, however, refused to settle the grievance. The union claimed that the employees were entitled to double payment on overtime based on the following spurious theory: if an employee works four 10-hour days and one 8-hour day, for a total of 48 hours, he should be paid daily overtime for all hours in excess of 8, or 8 hours for the week and, the union claimed, the employees should receive *in addition*, 8 hours overtime for the 8-hour day, for a total of 16 hours overtime for the week. The union's claim was made in spite of the clear prohibition against the pyramiding of overtime in the collective bargaining agreement.

9. On August 2, 1978, the union, acting through its President, Willie Rudd, caused to be posted on the plant's bulletin board (which bulletin board was provided to the union pursuant to Article X. Section 4 of the collective bargaining agreement) a "Special Bulletin" which was addressed to the employees. (See Trial Exhibit No. 5.) The bulletin was written by Mr. Rudd. The bulletin accused The Davis Company of "cheating" the employees out of "thousands of dollars" of overtime. The bulletin also said that a union meeting would be held that night to discuss what course of action the union would take. The bulletin was distributed among the employees as well.

10. On the night of August 2, 1978, there was a union meeting. According to the testimony of two union stewards, employees at the meeting expressed the feeling that they had been cheated. However, the stewards and Willie Rudd testified that there was no discussion of walking out during the August 2 meeting. In fact, the employees discussed a lawsuit as opposed to going on strike. No strike vote was taken.

11. According to the testimony of Mr. Carl Scarborough, the President of the International Union, all strikes by locals

must be approved by the International. The International received no request for strike authority, and it gave none.

12. About 2 P.M. on the afternoon of August 3, 1978, many employees walked off their jobs and left the plant. Because these employees held key production positions, the whole plant had to be shut down for the remainder of the day.

13. The plant was able to achieve no production or reduced production on August 3, 4, 7, and 8.

14. According to the testimony of The Davis Company's certified public accountant, the fixed cost of operations for The Davis Company was $1,002,473.90 during the fiscal year in question. Based upon a 365-day calendar year, the fixed cost per calendar day equals $2,746.50.

15. The testimony of the custodian of the plaintiff's production records reveals that there was no production on August 4. On august 3, 7, and 8, 1978, there was $64,845.00 in production, whereas normal production on those days would be a total of $125,062.86. Actual production during those three days was 51.8% of the normal production. Consequently the amount of fixed costs not recouped for August 3, 7, and 8 (48.15% times total fixed costs for those three days) would equal $3,967.32, based on a 365-day calendar year. Adding in the lost fixed-costs for August 4, the total damages for lost production as calculated by the fixed cost of operation will total $6,713.82 based on a 365-day calendar year.

16. The Davis Company was required to retain private security guards as a result of the walkout at a cost of $703.13.

17. The plant resumed full production on August 9, 1978.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the local union in this cause based on a breach of the collective bargaining agreement, pursuant to § 301 of the National Labor Relations Act. 29 U.S.C. § 185(a). This Court has pendant jurisdiction over the local union and Rudd individually in the state defamation

claims because the state and federal claims derive from a common nucleus of operative facts. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966).

2. The posting of the bulletin of August 2, 1978, which accused the plaintiff of cheating its employees out of thousands of dollars, constituted a breach of Article X, § 4 of the collective bargaining agreement which forbids the publication or circulation by the union of any false or misleading remarks about the employer or any of its officers.

3. At all times relevant to this suit Willie Rudd was acting president of the local, and as the local's agent acting within the course of his employment the union is responsible for his acts. *See* 29 U.S.C. § 185(b)(e).

4. The accusation that The Davis Company "cheated" employees was false and misleading and was also defamatory in that it falsely accused the company of dishonesty. Furthermore, there was clearly no basis for the interpreation assertd by Mr. Rudd of the overtime provision of the contract, Article VI, Section 1. The falsity contained in the notice posted on the bulletin board by Rudd was deliberate, and therefore actionable. *Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974). Because Mr. Rudd was acting as the president of the local, the local is liable for his defamatory statements, and both Mr. Rudd and the local are jointly liable on the defamation cause of action.

5. False, misleading, and defamatory remarks are not protected under the First Amendment or the National Labor relations Act. *Tempte, Inc.* v. *NLRB*, 590 F.2d 871 (10th Cir. 1979); *Bettcher Manufacturing Corporation*, 76 NLRB 526 (1948); *Maryland Dry Dock Company* v. *NLRB*, 183 F.2d (4th Cir. 1950).

6. The walkout by the employees and the resulting loss of production by the plaintiff was proximately caused by Mr. Rudd's false, misleading and defamatory statements posted on the bulletin board.

7. When a company suffers a loss of production as a result of a breach of contract or other wrongful acts, the company is entitled to damages measured by the loss of fixed costs of operation which are not offset by income otherwise derived or attributable to productive labor. *Sheet Metal Workers International Association* v. *Atlas Sheet Metal Company*, 384 F.2d 101, 109 (9th Cir. 1967). Based on the testimony of the company's certified public accountant and the custodian of the production records, that amount in damages equals $6,713.82. The plaintiff is also entitled to the costs of obtaining private security service in the amount of $703.13 for total compensatory damages in the amountof $7,416.95.

8. Punitive damages are recoverable under 29 U.S.C. § 185 to deter future intentional breaches of collective bargaining agreements which disturb industrial peace. *Wanzer & Sons, Inc.* v. *Milk Drivers Union*, 249 F.Supp. 664 (N.D. Ill. 1966). However, this Court finds that the conduct of Mr. Rudd lacks that degree of recklessness required for an award of punitive damages for the breach of the collective bargaining agreement or under Tennessee defamation law.

During final argument counsel for the defendants made arguments by which the defendants claim the union had a right to walk out or strike, and therefore this Court may not award damages for lost production resulting from the walkout. The defendants argued:

(1) The walkout was permitted pursuant to the grievance procedure, and

(2) The walkout was a protected activity pursuant to the National Labor Relations Act.

Neither of these contentions is supportable under the proof of the case.

IT IS THEREFORE ORDERED that the Clerk shall enter a judgment against the defendants United Furniture Workers of America, AFL-CIO, Local No. 282, and Willie Rudd and in

favor of the plaintiff, the Davis Company, in the amount of $7,416.95 plus costs.

Enter: this 30th day of May 1980.

/s/ Robert M. McRae, Jr., Judge
ROBERT M. MCRAE, JR.,
U.S. District Court

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-1477

THE DAVIS, COMPANY,
Plaintiff-Appellee

v

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; AND WILLIE RUDD,
Defendants-Appellants

ORDER

Filed: May 13 1982

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and WEICK, Senior Circuit Judge.

No judge in regular active service on the court having requested en banc consideration of the petition for rehearing filed herein by the plaintiff-appellee, the petition has been referred to the hearing panel. Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered upon the submission and decision of the appeal and that rehearing is not required.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX E

29 U.S.C. § 157. Rights of Employees

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in any industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organizations as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For thepurposes of actions andproceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.